No. 91-965

In The Supreme Court Of The United States

OCTOBER TERM, 1991

CHRIST COLLEGE, INC., *et al.*,

Petitioners,

v.

BOARD OF SUPERVISORS,
FAIRFAX COUNTY, VIRGINIA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Panel of the Court of Appeals below erred in holding that the compelling state interest balancing test of Sherbert v. Verner, 374 U.S. 398 (1963), and its progeny, should not be utilized to determine the validity of the actions taken by Town of Vienna, Virginia and the Vienna Board of Zoning Appeals in this case.
2. Whether the Panel of the Court of Appeals below failed to analyze the Thoburns' Free Exercise Claim as an "as applied" challenge to a facially neutral zoning ordinance, building code and fire code.
3. Whether the Panel of the Court of Appeals below erred in determining that the actions of the Town of

Vienna, Virginia and the Vienna Board of Zoning Appeals did not impose a burden upon the exercise of religion by the Thoburns.

4. Whether the Panel of the Court of Appeals below erred in determining that the Vienna Board of Zoning Appeals did not violate the Establishment Clause by imposing the conditions contained in the May, 1989 Conditional Use Permit issued to the Thoburns.

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U.S. Const. Amend. I

42 U.S.C. § 1983[1]

Vienna, Va. Town Code § 18-209

Vienna, Va. Town Code § 18-210[2]

STATEMENT OF THE CASE

Petitioners Robert Thoburn, owner of the Fairfax Christian School ("FCS"), members of the Thoburn family, Glen and Judy Dryden, parents of two (2) students, and Christ College, Inc., filed this suit pursuant to 42 U.S.C. § 1983 on August 1,

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[1]The text of U.S. Const. Amend. I and 42 U.S.C. § 1983 are set forth verbatim in the Appendix to the Petition for Writ of Certiorari.

[2]The text of Vienna, Va. Town Code § 18-209 and Vienna, Va. Town Code § 18-210 are set forth verbatim in the Appendix to this Brief.

1989.[3] Petitioners claimed violations of the First and Fourteenth Amendments to the United States Constitution. Specifically, Petitioners claimed violations of their rights to free exercise of religion, violations of the Establishment Clause, equal protection and due process. Petitioners named as defendants the Fairfax County Board of Supervisors ("Board"), the individual members of the Board, the Fairfax County Executive,[4] the Town of Vienna ("Vienna") and the Vienna Board of Zoning Appeals ("Vienna BZA").[5]

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[3]The Thoburns and Drydens will be collectively referred to herein as "the Thoburns."

[4]The Fairfax County Respondents will be collectively referred to herein as "the County."

[5]Christ College, Inc. brought no claims against the Town of Vienna, Virginia or the Vienna Board of Zoning Appeals in the District Court.

Trial commenced on May 7, 1990 and ended on May 9, 1990 when the United States District Court for the Eastern District of Virginia, Alexandria Division ("District Court"), granted the County, Vienna and Vienna BZA's Motions for Directed Verdicts. Joint Appendix in the United States Court of Appeals for the Fourth Circuit ("J.A.") at 2067-72.

A panel of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") affirmed the dismissal by Unpublished Opinion dated September 13, 1991. Appendix to Petition for Writ of Certiorari ("Petitioners' Appendix") at 1a. Petitioners' evidence in the District Court revealed the following facts.

Robert Thoburn started FCS in 1961 in what was then the Town of Fairfax. (J.A. 1518, 1589). FCS was located on commercial property and secured annual

zoning permits. (J.A. 1589-90). The Thoburns presented no evidence at trial to establish that this property, or any other, had any religious significance for them. FCS is and has been a for-profit business enterprise since its inception and is not tax exempt. (J.A. 1595-96, 1617, 3216).

FCS moved to Fairfax County in 1964, after securing a special permit for property located on Pope's Head Road from the Fairfax Board of Zoning Appeals ("County BZA"). (J.A. 1519-20, 3206-08). The Thoburns, at a later time, secured additional special permits from the County BZA to expand the size of FCS. (J.A. 1520, 1590, 3210-12, 3214, 3217, 3265-72). The Thoburns conducted devotion classes in classrooms at the Pope's Head Road property. (J.A. 1652).

The Fairfax County Zoning Ordinance requires that private schools of general education, such as FCS, secure approval of a special exception ("SE") from the Board to operate with 100 or more students on property zoned for residential uses. (J.A. 1530-31). The Vienna Zoning Ordinance requires all private colleges and schools of a non-commercial nature to obtain a Conditional Use Permit to operate in Vienna. (J.A. 1661; Appendix at 1a).

In February, 1985, the Thoburns purchased approximately fifty-nine (59) acres of property in the Oakton area of Fairfax County. (J.A. 3278-79). The Thoburns implicated the County Zoning Ordinance by submitting an SE Application for FCS in 1985 for 576 students on 37.51 acres of the Oakton property. (J.A. 3281, 3289, 3293). For various reasons, the

Board did not approve the SE. (J.A. 1534-35, 3323-27).[6]

On February 3, 1987, the Thoburns filed a second SE Application for FCS for the Oakton property. (J.A. 1535-37). On August 3, 1987, the Board of Supervisors denied the Thoburns' second SE Application after holding a public hearing. (J.A. 1537, 3377-3503).[7]

After the sale of the Pope's Head Road property, Thoburn leased portions of Jerusalem Baptist Church and Temple Baptist Church in Fairfax County as

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[6]A more detailed discussion of the Thoburns' initial SE Application for the Oakton property is presented in the County Respondents' Statement of the Case contained in their Brief in Opposition to Petition for Writ of Certiorari.

[7]A more detailed discussion of the Thoburns' second SE Application for the Oakton property is presented in the County Respondents' Statement of the Case contained in their Brief in Opposition to Petition for Writ of Certiorari.

interim sites for FCS. (J.A. 1171, 1525-26, 3280). The leases for the sites were for terms of one (1) year. (J.A. 3375-76, 3507-08). Jerusalem Baptist did not renew the lease. (J.A. 1547).

In late August 1988, after the County performed, at the Thoburns' request, a team inspection on two (2) houses located on Hunter Mill Road in Fairfax County, the Thoburns told Fairfax County executives that they intended to open FCS without an SE at the property. (J.A. 1554-55). On September 1, 1988, the County Fire Marshal, the Building Official and the Zoning Administrator filed suit in the Fairfax County Circuit Court to prevent the Thoburns from opening FCS at Hunter Mill without an SE and in violation of the building code. (J.A. 1175, 1241, 1862-63). The Circuit Court ruled for the County. (J.A. 1867-68).

After the issuance of the injunction, the Thoburns located their entire school (225 students, grades K-12) in Vienna at the Vienna Assembly of God Church (hereinafter "VAGC"). (J.A. 1560). The VAGC is located in a commercial area and one-half of its property is zoned for commercial uses. (J.A. 1560, 1667, 1848-50). Vienna is a Town in Fairfax County with a Town Council, separate Board of Zoning Appeals and a separate Zoning Ordinance. Since 1966, County officials have provided building inspections in Vienna. (J.A. 1799-1800, 2631-32).

In May, 1988, prior to locating the entire FCS at VAGC, the Thoburns requested a team inspection of VAGC. (J.A. 1690). The Thoburns requested the inspection because they knew that the building would have to be brought into compliance with building and fire codes before FCS could

lawfully operate there. (J.A. 1660). County officials made a team inspection of the VAGC for the Thoburns in May 1988 for 49 students. (J.A. 1640-42, 1659-61, 2198-2202).

In May 1988, the Thoburns applied for a Conditional Use Permit for 49 students, grades K-1, for the VAGC basement. (J.A. 1690). On July 20, 1988, the Vienna BZA approved FCS's application for a Conditional Use Permit for 49 students, grades K-1, for the VAGC basement. (J.A. 1662-63, 3809).

On September 19, 1988, the Thoburns applied for a Temporary Conditional Use Permit for 175 more students at the VAGC. (J.A. 1673). The next day, with no approval of the request for 175 additional students and no occupancy approval for even 49 students, and without consulting the Fire Marshal, the Thoburns moved their

entire school onto all floors of the VAGC. (J.A. 1560, 1643-44, 1694, 1780, 1782-88). The Thoburns knew such action violated their July, 1988 Conditional Use Permit. (J.A. 1644, 1778-79).

On September 21, 1988, County fire officials inspected the VAGC at the Town's request. County Fire Technician Timothy Sparrow ordered FCS to evacuate the VAGC premises based upon various violations of the applicable building and fire codes. (J.A. 1677, 1793-95, 1801). The Thoburns presented no evidence in the District Court as to the governmental capacity under which Fire Technician Sparrow was acting when he issued the Evacuation Order. The Thoburns refused to comply with the Evacuation Order and opened the school the next day. (J.A. 1647-48, 1783, 1791).

The Thoburns' own expert inspected the VAGC on September 22, 1988 and determined that numerous building code and fire code violations existed at the site for the Thoburns' use of the premises. (J.A. 1897, 3794-3802). The expert testified at trial that significant and serious code violations impaired the safety of the occupants of the VAGC, and that "a reasonable inspector could note the accumulative (sic) code issues and looked (sic) to issue an evacuation order." (J.A. 1919-21, 3794-3802).

Vienna sought and was granted an injunction from the Fairfax County Circuit Court to preclude further FCS operations at the VAGC without all necessary permits and approvals. (J.A. 1179-81). FCS continued to operate at the VAGC with over 200 students until the injunction ruling of the Circuit Court. (J.A. 1649).

FCS was allowed to occupy the VAGC with 49 students on September 29, 1988, and with all students two weeks later, once the Thoburns had substantially complied with all zoning ordinance, building code and fire code requirements. (J.A. 1182, 1681, 1714, 1753). The Thoburns presented no evidence at trial to show that County attorneys worked with Vienna attorneys on the injunction case.[8] The Thoburns further presented no evidence at trial to show that Vienna has any control over County public schools.

The Vienna BZA issued a permanent Conditional Use Permit to the Thoburns in May, 1989 for a maximum of 174 students, grades K-12. The Permit was limited to permanent classroom facilities on the

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[8]The Thoburns' conspiracy claim was not argued in the Fourth Circuit and is not included in their Petition.

first and second levels of the VAGC, and overflow room and musical instruments within the sanctuary. (J.A. 1701). The curriculum of FCS, including the holding of devotion classes, has not been affected by the issuance of the May, 1989 Conditional Use Permit. (J.A. 1652).

SUMMARY OF ARGUMENT

In their Petition, the Thoburns essentially argue that the Fourth Circuit erred in determining not to apply a compelling state interest analysis to the various governmental actions of the Vienna Respondents. The Fourth Circuit, after an extensive review of the District Court record, determined that none of the actions of the Vienna Respondents imposed a burden upon the Thoburns' exercise of religion. The Fourth Circuit's decision in this regard was in keeping with this Court's relevant First Amendment precedent

and is not in conflict with any decisions of other Circuit Courts of Appeals.

The Thoburns' evidence in the District Court, as reviewed by the Fourth Circuit, clearly revealed that there was no nexus between the actions of the Thoburns which were subject to governmental regulation and any religious beliefs of the Thoburns. Absent such a nexus, the Fourth Circuit correctly concluded that it need not apply a compelling state interest balancing test to determine the validity of the governmental actions involved. Furthermore, the Fourth Circuit correctly concluded that it need not reach the issue of whether the Thoburns' claim was "hybrid" inasmuch as the Thoburns had not presented any evidence to show that their Free Exercise rights were burdened. Thus, the Fourth Circuit concluded that the

actions of the Vienna Respondents simply did not implicate the Thoburns' Free Exercise rights.

The Fourth Circuit further ruled that the conditions contained in the May, 1989 Conditional Use Permit issued by the Vienna BZA did not violate the Establishment Clause. It did so after a thorough examination of the District Court record. Such review revealed a lack of any evidence to show that the actions of the Vienna BZA were anything but secular in nature or affected anyone's religious practices. The Fourth Circuit thus correctly concluded that no Establishment Clause violation existed.

ARGUMENT

I. THE PANEL OF THE COURT OF APPEALS BELOW CORRECTLY CONCLUDED THAT THE COMPELLING STATE INTEREST BALANCING TEST OF SHERBERT V. VERNER, 374 U.S. 398 (1963), AND ITS PROGENY, SHOULD NOT BE USED TO DETERMINE THE VALIDITY OF THE ACTIONS OF THE TOWN OF VIENNA, VIRGINIA AND THE VIENNA BOARD OF ZONING APPEALS IN THIS CASE

The Thoburns argue in Section I of their Petition that the Fourth Circuit erred in refusing to analyze their Free Exercise claim under the "compelling state interest" balancing test of Sherbert v. Verner, 374 U.S. 398 (1963), and its progeny. The Thoburns urge that this case involves "hybrid" rights which warrants the application of Sherbert's compelling state interest analysis. The Fourth Circuit declined to apply the compelling state interest test, finding, inter alia, that the Thoburns had failed to establish that the actions of Vienna and the Vienna

BZA had placed a burden on their exercise of religion.

It is axiomatic that the freedom to hold religious beliefs is absolute. See Cantwell v. Connecticut, 310 U.S. 296 (1940). However, the freedom to act in consequence of religious beliefs is not absolutely protected. In this regard, this Court has stated:

> [The First Amendment] embraces two concepts - freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definitions to preserve the enforcement of that protection.

Cantwell, 310 U.S. at 303-304. See also Reynolds v. United States, 98 U.S. 145 (1878).

Governmental conduct which imposes a substantial burden on an individual's

exercise of religion must be justified by a compelling state interest. Sherbert v. Verner, 374 U.S. 398, 406 (1963). However, there must be a nexus between the religious belief of an individual and action taken by such individual purportedly regulated by the State in order to implicate a Free Exercise analysis. See Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972). Sherbert, 374 U.S. at 404.

An individual must show a substantial burden on his ability to carrying out his religious beliefs as a prerequisite to a judicial determination of whether the government has an interest which overrides the individual's Free Exercise claim for exemption from government regulation. "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program

unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 303 (1985).

Most recently, this Court, in Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990), again emphasized that no compelling state interest analysis is required if the challenged action does not place a substantial burden on the exercise of religion. "'[T]he Free Exercise inquiry asks whether government has placed a substantial burden on the observation of essential religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'" 493 U.S. at 384-85 [quoting

Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)].

Amidst the Thoburns' argument that this Court's holding in Employment Division, Department of Human Resources of Oregon v. Smith, 110 S. Ct. 1595 (1990), dictated that the Fourth Circuit analyze their Free Exercise claim as one involving "hybrid rights" allegedly requiring a compelling state interest analysis, the Fourth Circuit specifically held that the Thoburns failed to establish that any of the zoning ordinances or safety codes involved in this matter burdened the Thoburns' exercise of religion. (Petitioners' Appendix at 8a). The Fourth Circuit found that there was no need to decide whether the Thoburns' claim was indeed a "hybrid" under Employment Division as the Thoburns ". . .failed to establish the first element in any Free

Exercise claim. They have not proved that the zoning laws or fire codes burdened their exercise of religion." (Petitioners' Appendix at 8a).

With respect to the Thoburns' actions at the VAGC, the evidence was undisputed that the Thoburns realized that they would need to comply with the applicable zoning ordinance, building code and fire code before FCS could begin operation at VAGC. To this end, the Thoburns made application for a Conditional Use Permit to operate FCS at VAGC with 49 or less students, grades K-1, in the basement of VAGC prior to opening the school. The Thoburns also requested a team inspection at VAGC by various County personnel prior to opening the school, as they knew the building would have to meet the applicable building and fire codes before operation could commence.

The Thoburns were granted a Conditional Use Permit in July, 1988 to operate FCS in VAGC basement, grades K-1, with a maximum of 49 students. It is undisputed that in September, 1988, the Thoburns moved the entire FCS into the VAGC facility in violation of their July, 1988 Conditional Use Permit. The Thoburns' actions in this regard were taken with the full knowledge that they were violating their Conditional Use Permit.

An inspection of the VAGC was effected by Fairfax County Fire Technician Timothy Sparrow, who noted numerous building and fire code violations in the facility. Mr. Sparrow then issued an Evacuation Order to the Thoburns. The Thoburns presented no evidence at trial to show that Mr. Sparrow was a policymaker for Vienna when he issued the Evacuation

Order, or that he was carrying out Vienna Policy when he issued the Order. Thus, municipal liability for the act could not be established. See City of St. Louis v. Praprotnik, 485 U.S. 112 (1988).

The Thoburns' own expert at trial testified that numerous building and fire code violations existed at the VAGC when the Thoburns moved the entire FCS into the facility. The expert testified that such violations significantly impacted on the safety of the occupants of the building.

It is undisputed that the Thoburns ignored the Evacuation Order and continued to operate the school in violation of their Conditional Use Permit, the Vienna Zoning Ordinance, as well as applicable building and fire codes. Even after Vienna filed its Petition for Injunction in the Circuit Court of Fairfax County, the Thoburns continued operating the

entire FCS at the VAGC. It was not until the Fairfax Circuit Court granted Vienna's Petition for Injunction that the Thoburns ceased to operate FCS at the VAGC.

The undisputed evidence in the District Court showed that the conduct taken by the Thoburns was simply conduct in violation of applicable State and local laws. Such conduct was not taken pursuant to religious beliefs. The Thoburns presented no evidence in the District Court to show that they held a religious belief that they could operate FCS in violation of applicable building, fire and zoning laws, or that they could not comply with such laws because of their religious beliefs. Furthermore, the Thoburns presented no evidence in the District Court to show that they held a religious belief that they could operate FCS in contravention of a lawfully issued

Evacuation Order. Such, however, was exactly the nature of the Thoburns' conduct regulated in this matter.

The evidence was uncontroverted that the Thoburns implicated the Conditional Use Permit processes by filing applications for Conditional Use Permits in May of 1988, September of 1988 and March of 1989. Clearly, the Thoburns realized that, even though they were operating a religious school, they still had to comply with the Vienna Zoning Ordinance.

Furthermore, the actions of the Thoburns indicate that they realized that the school must also comply with applicable building and fire codes to operate at the VAGC. The evidence was uncontroverted that the Thoburns requested a team inspection of the VAGC by Fairfax County personnel in both May of 1988 and

September of 1988 to determine what remedial actions would be necessary to bring the building into compliance with the applicable safety codes. The Thoburns' evidence was replete with indications of efforts they took to bring the VAGC into compliance with the codes after they had unlawfully moved the entire FCS into the facility.

The Thoburns do not contend that FCS may be operated irrespective of compliance with applicable State and local law, nor do they have a religious belief that compels them to do so. It was, however, the conduct of the Thoburns in attempting to operate FCS in violation of applicable zoning ordinances and safety codes which prompted the subject Evacuation Order and Injunction Suit.

The Fourth Circuit correctly recognized that the Thoburns had failed to

establish any nexus between the subject governmental regulation in this case and the impairment of the ability of the Thoburns to carry out a religious mission. The conduct being regulated simply had no relationship to religious beliefs of the Thoburns. Compare Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that the impact of a compulsory school attendance law affirmatively compelled Yoder to perform acts undeniably at odds with the fundamental tenets of his religious beliefs). Once the Thoburns substantially complied with applicable zoning, building and fire laws, they were permitted to operate FCS at the VAGC.

Similarly, the Thoburns presented no evidence at trial to show that the operation of FCS at the VAGC building itself had any religious significance to them. The evidence was undisputed that

the conditions contained in the May, 1989 Conditional Use Permit did not alter the curriculum of FCS. The Conditional Use Permit was purely secular in nature. The Permit did not forbid anyone from praying, conducting devotions or otherwise exercising their religious beliefs. FCS had operated for years in non-church facilities and regularly conducted devotion classes in classrooms. Thus, no burden was placed upon the Thoburns' exercise of religion by the conditions contained in the May, 1989 Conditional Use Permit.

The Thoburns argue that other Federal Courts of Appeals have recognized alleged "hybrid" claims of free exercise, in an apparent attempt to argue that the Fourth Circuit has rendered a decision in conflict with other Circuit Courts of Appeals. The basis for such an argument

is unclear inasmuch as the Fourth Circuit specifically held that it need not decide whether the Thoburns' claim was "hybrid". The Fourth Circuit has rendered an opinion in keeping with the precedent of this Court, avoiding any discussion of hybrid rights, given the nature of the evidence presented in the District Court.

This Court in Employment Division, supra, recognized that there was a danger in imposing a compelling state interest analysis to religion-neutral, generally applicable laws. In this regard, this Court stated:

> To make an individual's obligation to obey such a law contingent upon the laws' coincidence with his religious beliefs, except where the State's interest is "compelling" - permitting him, by virtue of his beliefs, "to become a law into himself" - contradicts both constitutional tradition and common sense.

Employment Division, 110 S. Ct. at 1603 (citation omitted)

This Court has consistently dismissed appeals for want of substantial federal question in cases upholding the validity of zoning ordinances which either excluded churches or religious schools from, or required zoning permits in, certain zoning districts. See, e.g., Damascus Community Church v. Clackamas County, 45 Or. App. 1065, 610 P.2d 273 (1980), appeal dismissed, 450 U.S. 902 (1981) (refusal to permit school to operate in church building in residential zone).

The actions of the Thoburns regulated by Vienna in this matter were not religiously motivated. Said regulation was merely the response to the unlawful actions of the Thoburns which were motivated solely by business reasons. The actions of the Vienna BZA were secular

actions taken pursuant to the Vienna Zoning Ordinance. By the Thoburns' own evidence, said actions did not burden their exercise of religion.

Thus, the Fourth Circuit correctly affirmed the District Court's dismissal of the Thoburns' Free Exercise claim. The Fourth Circuit did so without the need of determining whether the Thoburns' claim was of a "hybrid" nature. Therefore, the Thoburns' contention that the Fourth Circuit's Opinion in this case has created a conflict among the Circuits on the issue of "hybrid" rights is without merit.

II. THE PANEL OF THE COURT OF APPEALS BELOW ANALYZED THE THOBURNS' FREE EXERCISE CLAIM AS AN "AS APPLIED" CHALLENGE TO THE ZONING ORDINANCES, BUILDING CODE AND FIRE CODE INVOLVED IN THIS CASE

In Section II of their Petition, the Thoburns contend that the Fourth Circuit did not recognize their claims as an "as

applied" challenge to the zoning ordinances, building and fire codes involved in this matter. The Thoburns state in their Petition that they initially pled a facial challenge to the subject zoning ordinances, building and fire codes in their pleadings in the District Court as well as an "as applied" challenge. (Petition at 20, n. 17). The Thoburns argue that the Free Exercise Count of their Second Amended Complaint was "devoted almost exclusively to alleging that the 'actions' and 'pattern of conduct' of [Respondents] under color of State law had the 'effect' of burdening [the] exercise of their religious beliefs." (Petition at 21, quoting Second Amended Complaint).

It is submitted that the Fourth Circuit did analyze the Thoburns' claims as an "as applied" challenge to the

subject zoning ordinances, building and fire codes. The Fourth Circuit recognized that this Court's opinion in Sherbert v. Verner, 374 U.S. 398 (1963) ". . .was ground-breaking in that it recognized for the first time that a governmental action which was facially neutral, but had the effect of impairing the free practice of religion, would receive strict scrutiny." (Appendix at 7a). The Fourth Circuit then undertook a detailed analysis of whether the subject laws, as applied, had the effect of burdening the Thoburns' exercise of religion. The Fourth Circuit did not undertake to decide whether Sherbert was still viable under Employment Division, supra, because it did not find that the subject zoning ordinances or building and fire codes, or actions taken by the Vienna Respondents thereunder, burdened the Thoburns' exercise of religion.

The Fourth Circuit also addressed the Thoburns' argument that the subject zoning ordinances, building and fire codes had been applied discriminatorily against them under the Equal Protection theory plead by the Thoburns. (Petitioners' Appendix at 10a).[9] Thus, the Thoburns were afforded ample opportunity in both the District Court and the Fourth Circuit to make their "as applied" challenge.

There is simply no merit to the Thoburns' contention that the Fourth Circuit misunderstood their Free Exercise theory, in general, or their discrimination argument, in particular. The Fourth Circuit simply found that the subject zoning ordinances, building and fire codes, even in their application, did

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[9]Petitioners have not raised an Equal Protection argument in their Petition.

not burden the Thoburns' exercise of religion.

The Fourth Circuit has not rendered an opinion on this issue in conflict with other Circuits. The Fourth Circuit has, in fact, rendered an opinion on this issue in direct keeping with this Court's relevant precedent.

III. THE PANEL OF THE COURT OF APPEALS BELOW CORRECTLY CONCLUDED THAT THE SUBJECT ACTIONS OF THE TOWN OF VIENNA, VIRGINIA AND THE VIENNA BOARD OF ZONING APPEALS DID NOT IMPOSE A BURDEN ON THE THOBURNS' EXERCISE OF RELIGION

The Thoburns, in Section III of their Petition, contend that the Fourth Circuit erred in concluding that the actions taken by Vienna and the Vienna BZA in this case did not impose a burden on the Thoburns' exercise of religion. Curiously, the Thoburns appear to acknowledge that the Fourth Circuit never needed to reach the question of whether the case presented a

"hybrid" right situation because it found no burden on the Thoburns' exercise of religion by the governmental conduct in question. In light of the arguments contained in Section III of the Petition, the Thoburns cast doubt on the arguments contained in Section I of their Petition.

As set forth in Section I, supra, this Court has consistently required that an individual make a showing that the government regulated conduct taken pursuant to religious beliefs before the Sherbert balancing test should be applied. Both the District Court and the Fourth Circuit have reviewed the Thoburns' evidence at trial and have determined that the Thoburns presented no evidence to show that Vienna or the Vienna BZA regulated conduct taken pursuant to religious beliefs.

The Thoburns had no religious belief that they could operate FCS without complying with the applicable zoning ordinance and building/fire codes. To the contrary, the evidence was clear that the Thoburns systematically identified the acts necessary to comply with such laws and took steps to comply with the same until they determined that it was not in their economic interest to do so. When the Thoburns took it upon themselves to violate applicable law, conduct not taken pursuant to religious beliefs, they were subjected to the regulations of which they complain in this action.

Similarly, the Thoburns presented no evidence at trial to show that any building which they used, or attempted to use, to house FCS had any religious significance to them. Thus, the subject zoning ordinance, building code and fire

code which, as applied, were building specific, did not burden the Thoburns' exercise of religion.

The Thoburns wish this Court to compare the evidence presented in this case with evidence presented in other cases, including state court cases, to determine if there is a conflict between the Circuit Courts of Appeals on the issue of burden. The Thoburns fail to recognize that the determination of whether a burden exists upon an individual's exercise of religion is inextricably intertwined with the facts of a particular case. Two courts have now reviewed the Thoburns' evidence at trial and have concluded that the Thoburns failed to meet their burden of proof on this central issue.

This case cannot be compared with others in an attempt to create "a conflict between the Circuits." The Fourth Circuit

simply reviewed the Thoburns' evidence presented at trial, and in keeping with this Court's relevant precedent, dismissed the Thoburns' Free Exercise claim.

IV. THE PANEL OF THE COURT OF APPEALS BELOW CORRECTLY CONCLUDED THAT THE VIENNA BOARD OF ZONING APPEALS DID NOT VIOLATE THE ESTABLISHMENT CLAUSE BY IMPOSING THE CONDITIONS CONTAINED IN THE MAY, 1989 CONDITIONAL USE PERMIT ISSUED TO THE THOBURNS

The Thoburns contend in Section IV of their Petition that the Vienna BZA violated the Establishment Clause by imposing certain conditions in the May, 1989 Conditional Use Permit issued to the Thoburns for the VAGC.

This Court's interpretation of the Establishment Clause is fully set forth in Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1951), to-wit:

> Neither a state nor the federal government can set up a Church. Neither can pass laws which aid one religion over another. Neither can force or influence a

> person to go to or remain away from Church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs or for church attendance or nonattendance. . .Neither a state nor the Federal Government can operate or secretly participate in affairs of any religious organization or groups and vice versa.

Id. at 210-211. See also Everson v. Board of Education, 330 U.S. 1 (1947).

It is well settled that the Establishment Clause does not exempt religious organizations from secular governmental activities such as zoning regulations, fire inspections and building and regulations. See Tony and Susan Alamo Foundation, supra. See also Lemon v. Kurtzman, 403 U.S. 602 (1971). The Thoburns presented no evidence at trial to show that the conditions placed by the Vienna BZA in the May, 1989 Conditional

Use Permit addressed anything but secular concerns or were beyond the BZA's legal authority to impose such conditions. Furthermore, the Thoburns' own evidence indicated that the conditions placed in the Permit did not affect the curriculum of the FCS or otherwise interfere with the Thoburns' religious beliefs or practices.

Upon the evidence in the District Court, or lack thereof, both the District Court and the Fourth Circuit found no Establishment Clause violation. Despite the Thoburns' emotive and argumentative presentation of this issue in this Petition, it is clear that their Establishment Clause claim was dismissed simply for a failure to present the necessary proof of an Establishment Clause violation.

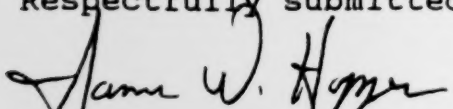
The Vienna BZA did not prohibit any FCS teachers or students from attending

religious classes, engaging in Bible study, saying prayers, conducting devotions, or otherwise conducting the affairs of FCS. The issuance of the Permit was a secular act taken pursuant to the Vienna Zoning Ordinance. The Thoburns presented no evidence to the contrary. The Fourth Circuit thus correctly affirmed the dismissal of the Thoburns' Establishment Clause claim.

CONCLUSION

WHEREFORE, based upon the foregoing, these Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,



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Dated: January 15, 1992

APPENDIX

Article 21

Conditional Use Permits

18-209 Use Permit Subject to Certain Conditions. The Board of Zoning Appeals may issue a use permit for any of the uses enumerated in § 18-210 in response to an application therefor, provided the use for which the permit is sought will not (1) affect adversely the health or safety of persons residing or working in the neighborhood of the proposed use, (2) will not be detrimental to the public welfare or injurious to property or improvements in the

neighborhood, and (3) will be in accord with the purposes of the Master Plan of the Town of Vienna. In granting any use permit the Board of Zoning Appeals may impose such conditions in connection therewith as will assure that the use will conform to the foregoing requirements and that it will continue to do so, and may require a guarantee or bond to insure that the conditions imposed are being and will continue to be complied with.

18-210 Use Permits Required. A use permit is required for any of the following uses. (See regulations for Zone in which the use is proposed to be located):

A. Amusement enterprises, if conducted wholly within an enclosed building, provided that the existence and location of the same shall not impose a deleterious effect upon the Town and that permits therefor shall insure compatibility with land use policies embodied in the Town zoning ordinances. (Amen 4-4-83)

B. Auditoriums and halls.

C. Auto sales.

D. Bowling alley.

E. Carpenter or general woodworking shop (excluding outdoor storage).

F. Cemeteries.

G. Colleges and Schools (Private, Elementary and

High) of a non-commercial nature.

H. Concrete mixing plants.

HH. Minute Car Wash Stations. (Amen. 5-10-71)

I. Contractor's equipment storage yard or plant, or rental of equipment commonly used by contractors.

J. Draying, freighting, or trucking yard or terminal.

K. Farm or gardening implement, sales and service.

L. Feed and Fuel Yard.

M. Funeral Homes.

N. Golf courses, country clubs, private clubs, including community buildings and similar

recreational uses not owned and/or operated by a public agency. (Does not include golf driving ranges.)

O. Hospitals, sanitariums and clinics which are an integral part of such hospitals and clinics providing treatment for mental or behavioral disorders as out-patient counseling or therapeutic facilities only; and provided that such clinics if not an integral part of a hospital or sanitarium be formally affiliated with such hospital or sanitarium or such other governmemtally sponsored organization that provides

counseling for mental or behavioral disorders. (Amended 6-2-80)

Notwithstanding any of the above, all clinics and facilities not an integral part of a hospital or sanitarium and treating contagious diseases, drug or alcohol addicts or abusers, sex offenders, felons, or persons suffering from psychosis, anti-social personality disorders or explosive personality disorders are not permitted regardless of whether such facility operates an in-patient or out-patient facility,

counseling or therapeutic facility or otherwise. (Amended 6-2-80)

Animal hospitals not providing boarding facilities other than for hospitalization to provide medical and/or surgical care for the patient are likewise subject to procurement of a use permit. However, animal hospitals providing boarding facilities not directly associated with immediate medical and/or surgical care for the patient are not permitted. (Amen 6-2-80)

P. Hotel and Motel. (Amen. 12-6-71)

Q. Institutional home and institutions of an educational or philanthropic nature, except those of a correctional nature or for mental cases.

R. Nursery and kindergarten schools (private).

S. Outdoor amusement enterprises.

T. Pet shop.

U. Plumbing yard or storage.

V. Office of a physician or dentist and medical or dental clinics or laboratories operated in conjunction with such office.

W. Public buildings and uses.

X. Public parking area in transitional use.

Y. Public parks, playgrounds, and other recreational uses.

Z. Public utilities, as defined and regulated in Sec. 18-13.

AA. Taxi stand (only private property).

BB. Theater, indoor or outdoor.

CC. Hotel. (Amend. 12-6-71)

DD. Manufacture, compounding, processing, packaging, or treatment of such products as bakery goods, candy, cosmetics, diary products, drugs, perfumes, pharmaceuticals, perfumed toilet soap, toiletries and

food products except fish and meat products, sauerkraut, vinegar, yeast and the rendering or refining of fats and oils.

EE. Transitional parking lots. (Amend. 3-69)

FF. Live entertainment and patron dancing in restaurants. (Amend. 2-71)

GG. Consumption of meals on a roof garden of an enclosed building in which a restaurant is located, or at sidewalk tables directly adjoining such building. (Amend. 2-71)